No. 16097

In the United States Court of Appeals for the Ninth Circuit

ROBERT E. AUSTIN and MARIAN H. AUSTIN,
PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

On Petition for Review of the Decision of the Tax Court of the United States

BRIEF FOR THE RESPONDENT

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CITATIONS

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The findings of fact and opinion of the Tax Court (R. 17-29) are not officially reported.

JURISDICTION

This appeal involves deficiencies in income tax as determined by the Commissioner against the taxpayer [1] for the calendar years 1950, 1951 and 1952 in the total amount of $2,502.30. (R. 17.) On Decem-

[1] Robert E. Austin is hereinafter referred to as the taxpayer, his wife being included as a party merely because joint returns were filed.

ber 31, 1954, the Commissioner of Internal Revenue mailed to the taxpayer notice of a deficiency. (R. 6-12.) Under the provisions of Section 272 of the Internal Revenue Code of 1939, taxpayers on March 25, 1955, filed a petition for redetermination of the deficiencies as determined by the Commissioner. (R. 3-5, 12.) The decision of the Tax Court was entered on April 28, 1958. (R. 30.) Petition for review by this Court was filed on June 16, 1958. (R. 30-31.) This Court, therefore, has jurisdiction of the case under Section 7482 of the Internal Revenue Code of 1954.

QUESTION PRESENTED

Whether the evidence supports the Tax Court's holding that certain real estate lots were held primarily for sale to customers in the ordinary course of taxpayer's trade or business, within the meaning of Section 117 of the 1939 Code, and, accordingly, that the gain realized on the sale of such property was subject to taxation as ordinary income.

STATUTES AND REGULATIONS INVOLVED

These are set out in the Appendix, *infra*.

STATEMENT

The facts, as found by the Tax Court (R. 17-26), may be summarized as follows:

During the period 1943 through 1950, the taxpayer, who has been a practicing attorney since 1912, purchased or otherwise acquired 168 lots and parcels of land in 24 separate transactions in and around the Manhattan California Beach area. His law office is

in Los Angeles; however, he has resided in Manhattan Beach since 1929, although he acquired property (by transfers for legal services) in Manhattan Beach in 1918. The population of the area, which was primarily a resort area located 19 miles south of Los Angeles, was only 5,000 in 1929 when the taxpayer established his permanent residence there. (R. 18-19.)

Since 1932 the taxpayer has been active in the civic affairs of the Manhattan Beach area, being a member of the School Board; assisting in organizing the local water district and serving as a member of its board of directors; and representing the water district on the board of Metropolitan Water District of Southern California. (R. 18.)

It was stipulated that the following real estate acquisitions were made by the taxpayer during the period 1943-1952. (Some lots, in addition to the foregoing, were also acquired by taxpayer during this period.) (R. 18-19.)

Year	No. of Transactions	No. of Lots
1943	2	2
1944	2	5
1945	3	69½
1946	6	64½
1947	6	16
1948	3	9
1949	1	1
1950	1	1
1951	0	—
1952	0	—

The lots acquired in 1943 were purchased at an auction of tax delinquent properties. The taxpayer

and others, prior to the auction, asked the local tax collector to include certain lots among those scheduled for sale, and agreed to make opening bids on these lots. Taxpayer bid on 30 or 40 lots at this auction. He purchased one lot for a friend who at the time of the bidding had used up his available funds. (R. 19.)

Three of the lots acquired in 1944 were received in payment for taxpayer's legal services. Taxes were never paid by him on this property and the lots were subsequently sold to meet the tax bill. Two other lots acquired in that year were located across the street from where taxpayer was then residing, and were purchased to protect the character of the neighborhood. (R. 19.)

One hundred and two of the lots acquired during 1945 and 1946 were sold to taxpayer by the City of Manhattan Beach. The sales arose from the following circumstances: Certain property, located in Manhattan Beach (sometimes hereinafter referred to as the city), was owned by the State of California and was not on the city's tax rolls. In order to list the property on the city's tax rolls it had to be privately owned, and the officials of the city were desirous of bringing about this result. Accordingly, a plan was devised whereby the city could acquire the property and then sell it to private parties. This plan entailed expenditures in amounts greater than the officials of the city were prepared to undertake. To aid in carrying out the plan the taxpayer and three others agreed to pay the city any loss it might suffer as a result of this plan. In accordance with this agreement taxpayer purchased 102 lots which the city had acquired

from the State and which it was unable to dispose of at public auction. (R. 19-20.)

Taxpayer acquired two lots in 1945 from a Mr. Friedman, one of his clients. (R. 20.)

Taxpayer purchased nine lots from the Pacific Land and Title Company in 1945. These purchases were connected with his membership in the Manhattan Beach Property Owners Association and that association's interest in acquiring a park. (R. 20.)

Two of the lots acquired by taxpayer in 1946 were located across the street from where he then resided, and were purchased to protect the character of the neighborhood. (R. 20.)

Taxpayer acquired 21 lots in 1946 from the Amaranth Land Company under the following circumstances: A client of taxpayer's was involved in a joint venture concerning real property. At the death of the client taxpayer was retained by the deceased's family to represent them in the disposition of the joint venture's property. In the course of winding up the joint venture, and while acting on behalf of the family, taxpayer entered the highest bid for the property. The family was interested in improving its cash position, and was disappointed in taxpayer's actions on their behalf. He paid the amount bid to the joint venture and the property was sold to him. (R. 20-21.)

Taxpayer purchased one lot in 1946 and four lots in 1947 which adjoined property already owned by him. The new acquisitions were to provide automobile parking facilities should future improvements on the original lots make such facilities necessary or appropriate. (R. 21.)

Taxpayer acquired two tracts of land, referred to as "lots" by the parties, in 1947 which totaled 125 acres. Part of this acquisition was received by him in payment for legal services. (R. 21.)

Taxpayer purchased six lots in 1947 for possible use as a site for a house. He built a house on these lots toward the end of 1948, and since that time it has been his home. Two other lots acquired by him in 1947 were transferred by a couple who had earlier been given the property by taxpayer with the understanding that they (the couple) pay for it whenever able. The uncertain financial position of the couple in 1947 resulted in the retransfer of the property. (R. 21.)

Two lots purchased by taxpayer in 1947 from a real estate broker were subsequently improved, and supplied him with rental income. (R. 22.)

Two additional lots were acquired in 1947 under the following circumstances: On one occasion in 1947 a client, Mr. Clendennin, came to taxpayer's office and discussed with him problems concerning certain lots owned by the client's daughter. Clendennin thought that his daughter would eventually lose money on these lots. He returned about one week later, told taxpayer that he had been advised that he (the client) did not have long to live, and asked taxpayer to purchase the daughter's property. Taxpayer purchased two lots from the daughter; shortly thereafter the client died. (R. 22.)

Four lots acquired in 1948 were purchased for residential purposes, and taxpayer lived in the house thereon during 1948. He sold this property after

moving into the house built on the six lots mentioned above. (R. 22.)

Taxpayer purchased three lots in 1948 from the Pacific Land and Title Company. (R. 22.)

One lot was purchased in 1949 to make available additional parking and sewage facilities to a building, owned by taxpayer, which housed a laundry. (R. 22.)

Taxpayer purchased one lot in 1950 from a neighbor who was unable to pay a debt to him. (R. 22.)

Taxpayer made the following sales of real property, payment for which was sometimes made in installments (R. 23):

Year	No. of Transactions	No. of Lots
1946	24	38
1947	8	13
1948	22	26
1949	7	15
1950	5	11
1951	8	23
1952	10	14
1953	4	?[2]
1954	1	?
1955	5	?

Taxpayer acquired the lots sold in 1950, 1951 and 1952 in the following years (R. 23):

	Year Lot Sold		
Year Lot Acquired	1950	1951	1952
1943	1		
1944			2
1945	4	1	4
1946	6	20	6
1947			1
1948		2	
1949			1

[2] Question marks are used herein to indicate the absence of relevant evidence in the record.

Taxpayer made sales of real property in the following total amounts (R. 23):

1950	$ 7,750.00
1951	15,750.00
1952	21,584.32

During the three years in issue the taxpayer sold 48 lots or parcels of land in 23 separate transactions for the total sum of $45,084.32. During the seven-year period 1946-1952, the taxpayer sold at least 140 lots in 84 separate transactions. (R. 23-24.)

Taxpayer's gross income for the years 1943 through 1952 was composed of the following items (R. 24):

ar	Rent	Income from Interest	Number of Law Practice Fee Collections	Gross Amount Law Practice Fee Collections	Net Collections From Law Practice	Net Profit On Real Estate Sales	Gross Income
43	1,890.00	195.00	101	3,849.10	1,832.93	.....	5,934.10
44	1,140.00	.....	106	6,628.23	4,434.48	678.00	8,446.23
45	.....	.....	122	9,081.18	5,444.90	210.32	9,291.50
46	.....	.....	89	5,345.00	1,756.62	17,655.71	23,000.71
47	7,596.00	390.00	77	7,649.15	3,502.89	12,357.70	27,992.85
48	10,762.79	288.40	76	5,977.40	2,166.40	6,737.12	23,765.71
49	5,838.50	696.38	83	6,079.19	1,476.43	6,029.72	18,643.79
50	5,456.00	522.51	91	5,232.67	1,162.91	7,782.56	37,637.53
51	6,820.94	897.72	140	9,360.80	4,851.60	10,476.79	27,556.25
52	7,125.00	2,144.07	117	6,156.68	1,279.08	9,308.59	24,734.34

The net profit on real estate sales shown above for the years 1950 through 1952 includes the profit from installment payments received in those years on account of 12 sales made in prior years. (R. 24-25.)

Taxpayer's income from his law practice and his real estate sales for 1953, 1954 and 1955 was as follows (R. 25):

Year	Net Profit on Real Estate Sales	Gross Amount Law Practice Fee Collections	Net Amount Law Practice Fee Collections
1953	$ 9,256.24	?	?
1954	16,675.56	$7,567.00	$2,825.00
1955	19,822.00	9,900.00	4,544.00

The net profit on real estate sales shown above for the years 1953 through 1955 includes installment payments received in those years on account of sales made in prior years. (R. 25.)

Taxpayer did not advertise in connection with his real property, nor did he post any "for sale" signs. He did not list the property with real estate brokers, and neither he nor his wife was a licensed real estate broker. He did not maintain an office in his home, and his home telephone number was listed under the name of Marian H. Austin, his wife. (R. 25.)

Sales were initiated by prospective customers contacting taxpayer through the mails or over the telephone. Negotiations were conducted in the same manner, and taxpayer often did not come into personal contact with purchasers. On some occasions sales were initiated by brokers. On these occasions the brokers were acting for third parties. (R. 25.)

Whenever necessary taxpayer would prepare legal documents in connection with a sale in his law office. Prospective customers never came to his law office. Most of the sales involved were closed in escrow offices, not at taxpayer's home. (R. 25-26.)

Taxpayer sometimes borrowed money from banks to help finance real property purchases. (R. 26.)

There has been a large amount of real estate development in Manhattan Beach since 1945. People

interested in purchasing property in Manhattan Beach went through the tax rolls to learn the names of property owners. Owners of property received numerous unsolicited inquiries concerning their property. Taxpayer was aware of this situation. (R. 26.)

The real property owned by taxpayer was listed on the tax rolls under the names of Robert E. Austin and Marian H. Austin at their home address. (R. 26.)

The Commissioner determined that the lots sold by taxpayer were held by him primarily for sale to customers in the ordinary course of trade or business. The Tax Court upheld that determination. (R. 17, 26.) It is from this holding that the taxpayer petitioned this Court for a review.

SUMMARY OF ARGUMENT

The Tax Court found that the 48 real estate lots in issue were held for sale in the ordinary course of taxpayer's trade or business and accordingly, that the gain from their sale is taxable as ordinary income, rather than as capital gain under Section 117 of the Internal Revenue Code of 1939. The courts have held uniformly that this type of issue is a factual one; that no one fact or factor is determinative of the issue; and that upon review, the lower court's decision will not be disturbed unless it is "clearly erroneous" or is adduced from an erroneous view of the law.

This review necessarily requires an examination of the entire record by the Court. In making such an examination it will be seen that there was ample

evidence before the Tax Court to justify its findings and conclusion, particularly in the light of the decided cases by this Court and other appellate courts on the subject.

The taxpayer contends that, in purchasing or otherwise acquiring more than 168 lots in eight years and selling over 140 lots in ten years, he was engaged in activities which amounted to an investment of his funds and the liquidation of such investment. The evidence is inconsistent with the latter content and shows, among other things, (1) the acquisition of such lots in a growing beach resort area with the admitted purpose of resale at a profit; (2) frequent and continuous sales of lots and building sites in a ready-made market requiring no ostensible sales campaign by the taxpayer; (3) activity or "busyness" on the part of the taxpayer in purchasing property, constructing buildings, renting property and the handling of most purchases and sales and all of the sales details and paper work personally in his law office, particularly concerning the lots in issue, thereby indicating an over-all pattern of engagement in the real estate business; and (4) substantial income from real estate sales which exceeded greatly his income from professional fees as an attorney.

The Tax Court exercised its function with care and its findings and decision are supported fully by the record.

ARGUMENT

The Evidence Supports The Tax Court's Finding That The Lots In Issue Were Held By Taxpayer Primarily For Sale To Customers In The Ordinary Course Of His Trade Or Business

The issue for determination is whether the gain realized from the sale of the lots and parcels in question is to be taxed as ordinary income or is to be afforded treatment as a long-term capital gain. It is taxpayer's contention that the properties constituted capital assets, that they were acquired and held as an investment, and that their sale was in the nature of a liquidation of capital assets. (R. 4, 34; Br. 2.)

Section 117(a)(1) of the Internal Revenue Code of 1939 (Appendix, *infra*) defines capital assets as property held by the taxpayer, but excludes from its definition, *inter alia*, "property held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, * * *." The Commissioner determined, and the Tax Court found as a fact (R. 17, 26), that the lots in issue were held primarily for sale to customers in the ordinary course of taxpayer's trade or business.

This finding by the Tax Court is determinative of the issue and will be accepted if supported by the evidence. The question is one of fact and the lower court's findings will not be set aside unless they are "clearly erroneous" and are induced by an erroneous view of the law. The established rule was stated by this Court in *Stockton Harbor Indus. Co.* v. *Commissioner*, 216 F. 2d 638, 650:

> As stated in the outset, the scope of our review is limited. * * * We cannot substitute our judg-

> ment as to facts for that of the Tax Court, and can only upset the findings if there is no substantial evidence to support them. What is and what is not trade or business and when property is or is not held for sale to customers are questions of fact.[3]

See, also, *Higgins* v. *Commissioner*, 312 U.S. 212, rehearing denied, 312 U.S. 714; *Harriss* v. *Commissioner*, 143 F. 2d 279 (C.A. 2d); *Saltzman* v. *Commissioner*, 227 F. 2d 49 (C.A. 3d); *Williamson* v. *Commissioner*, 201 F. 2d 564 (C.A. 4th); *Fackler* v. *Commissioner*, 133 F.2d 509 (C.A. 6th); *Murray* v. *Commissioner*, 238 F. 2d 137 (C.A. 10th); and these recent decisions of this Circuit, *Bistline* v. *United States*, No. 15,716, decided May 13, 1958 (1 A.F.T.R. 2d 1813); *Achong* v. *Commissioner*, 246 F. 2d 445.

The courts have given consideration to a number of elements in resolving this question. The following summary of these factors, contained in this Court's

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[3] This statement was adopted by this Court in the recent case of *Pool* v. *Commissioner*, 251 F. 2d 233, 235. And the Fifth Circuit, in the latest of a long line of cases on the subject, made this statement (*Gamble* v. *Commissioner*, 242 F. 2d 586, 590):

> Each case must be decided on its own facts. The question as to whether property was held * * * for sale * * * is principally a fact question, and one where the Tax Court has the function of making the original determination through the process of weighing and balancing conflicting facts and factors and drawing from these the inferences and conclusions upon which a decision is to be based.

See also, Rule 52(a), Federal Rules of Civil Procedure, and Section 7482(a), Internal Revenue Code of 1954.

opinion in *Stockton Harbor Indus. Co.* v. *Commissioner*, *supra*, p. 650, was adopted in the more recent case of *Pool* v. *Commissioner*, 251 F. 2d 233, 235-236 (C.A. 9th):

> Many tests have been proposed by this and other courts. Among them are: (1) the nature of the acquisition of the property, (2) frequency and continuity of sales over a period of time, (3) the nature and extent of the taxpayer's business, (4) the activity of the seller about the property, such as the extent of his improvements or his activity in promoting sales, (5) the extent and substantiality of the transaction and the like. * * * But in the last analysis, each case must be determined upon its own specific facts, for none of these incidences are present in all cases.

As indicated in *Stockton Harbor*, in few, if any, of the cases are all of these factors present or applicable. And as the Fifth Circuit has pointed out (*Gamble* v. *Commissioner*, 242 F. 2d 586, 590), "No single evidentiary fact will be decisive in the usual case." See also, *Pool* v. *Commissioner*, *supra*, pp. 235-236.[4]

In reviewing the record, this Court will discover that the Tax Court's ultimate findings were not only free from clear error, but were amply warranted by the evidence when considered in the light of the decided cases.

Taxpayer contends that his only business or profession was that of an attorney, that his activity in buying and selling property was carried on independently of his law profession and that the time spent

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[4] Taxpayer apparently argues that all of these factors must be satisfied in order to find a business. (Br. 11, 26.)

in the conduct of such real estate activity was insignificant in comparison with the time spent in his law practice. (R. 4, 5, 39, 71.) However, it is well established that one may engage in more than one business at one time, and that in a situation such as exists here, the holding for sale and the selling of property does not necessarily require the taxpayer to devote a substantial portion of his time to such endeavors. *United States* v. *Beard*, No. 15,560, decided May 26, 1958 (C.A. 9th) (1 A.F.T.R. 2d 1830); *Rollingwood Corp.* v. *Commissioner*, 190 F. 2d 263 (C.A. 9th); *King* v. *Commissioner*, 189 F. 2d 122 (C.A. 5th); *Di Lisio* v. *Vidal*, 233 F. 2d 909 (C.A. 10th). More particularly, one may, and often does, engage in the practice of law and, at the same time actively engage in the real estate business. *Gamble* v. *Commissioner*, *supra; Murray* v. *Commissioner*, *supra; Saltzman* v. *Commissioner*, *supra; Fackler* v. *Commissioner*, *supra.* Taxpayer overlooks the fact that one may ostensibly be engaged in a principal endeavor and at the same time be conducting one or more businesses out of his hip pocket, so to speak, in such a manner as to subject himself to the same liability for income taxes as others who are conducting similar businesses as their sole occupation.[5]

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[5] Unless a realtor is liquidating a rental project or handling property as an investment apart from his regular business, cases concerning this issue do not ordinarily involve a person or firm engaged principally in the real estate business. The difficulty arises when one, who has another and primary occupation, commences to deal in the purchase and sale of property for profit, generally as a side line. *Rollingwood Corp.* v. *Commissioner, supra,* p. 266; *Pool* v. *Commissioner, supra,* p. 236. In the *Gamble, Murray, Saltzman* and

During the period 1943 through 1950, the taxpayer purchased or otherwise acquired at least 168 lots and parcels (two of the so-called lots contained 125 acres) of land in 24 separate transactions in and around Manhattan Beach, a fast growing resort area. (R. 18-19, 26, 80.) While he maintained his law office in Los Angeles, he resided in Manhattan Beach, where he became active in civic affairs, serving on the School Board, the local water district board and the Manhattan Beach Property Owners Association. (R. 18.) In the latter capacity, which consumed a substantial amount of his time (R.39), he assisted in obtaining many improvements to the area, such as streets, parks, and "so on" (R. 53).

Because of the active part he played in civic affairs and because of his extensive real estate holdings and dealings,[6] taxpayer was well known throughout the

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Fackler cases, *supra,* as well as in *Fahs* v. *Crawford,* 161 F. 2d 315 (C.A. 5th); *Ross* v. *Commissioner,* 227 F. 2d 265 (C.A. 5th), attorneys were involved; in *Smith* v. *Dunn,* 224 F. 2d 353 (C.A. 5th), an architect; in *Di Lisio* v. *Vidal, supra,* a banker; in *White* v. *Commissioner,* 172 F. 2d 629 (C.A. 5th), a paving contractor; in *Bistline* v. *United States, supra,* a business manager of a transit company; and in *United States* v. *Beard, supra,* the president of a refrigerating company. In practically all of the cases involving persons other than realtors the taxpayers have not held a real estate agent's or broker's license, but it is well settled that this is not a prerequisite to the conduct of a real estate business under Section 117(a), *Lobello* v. *Dunlap,* 210 F. 2d 465 (C.A. 5th); *King* v. *Commissioner, supra.*

[6] In addition to the extensive lot purchases, the taxpayer improved some lots and constructed a few buildings in the area, one which contained a laundry (R. 22, 64, 66); bought property adjacent to potentially good business lots (R. 61); purchased lots to gain access to and "fill out or build up"

area. Bankers, real estate agents, brokers, builders, civic leaders and others came to him frequently concerning the purchase and sale or development of property. (R. 47, 48, 52, 53, 60, 61, 62, 63, 67, 68, 77, 85.) As he testified, "a good many of my friends knew that I had some lots around" (R. 85), "brokers have frequently called me seeking lots for builders" (R. 77); and he had a flood of unsolicited inquiries concerning the sale or purchase of property (R. 81).

The taxpayer was aware of the potential growth of the Manhattan Beach area, of the rising demand for vacant lots and of the fact that such lots would increase in value (R. 80, 81, 84) although he would have the Court believe that he was improvident in purchasing the lots and that he only "stumbled" into a good business proposition. (Br. 19-20.) He testified that the usual procedure was for prospective purchasers to check the tax rolls in order to ascertain the names of the owners of various lots throughout the area, that he knew of such demand (R. 84), and that he carried the lots owned by him in his name and in the name of his wife (R. 46-47).

One of the factors considered by the courts is the purpose for which the property was acquired. The general rule is stated by this Court in *Palos Verdes Corp.* v. *United States*, 201 F. 2d 256, and in *Rollingwood Corp.* v. *Commissioner*, *supra*, p. 266, wherein it is pointed out that while the purpose for which the property was acquired is of some weight, the ultimate

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sites already owned by him (R. 62-63); purchased property for sewage disposal; purchased five lots and built thereon an automobile agency (R. 83); and purchased lots which were later given to or sold to a church (R. 62).

question is the purpose for which it was held at time of sale. The Fifth Circuit has stated the rule thus (*Gamble* v. *Commissioner*, *supra*, p. 590):

> While the ultimate concern is the purpose for which the property was held at time of the sale, it is necessary to consider also the purpose for which it was held prior to sale.

The taxpayer contends that he purchased or otherwise acquired the lots either as an investment or in furtherance of his desire to be of aid to the community of Manhattan Beach.[7] (Br. 2, 12-15.) However, his continuous real estate activity and his own testimony indicate a contrary intent. He was always interested in acquiring property as payment for legal services or through purchase if he could get "a good buy". (R. 70-71.) He continuously maintained a heavy inventory of lots and was always willing to sell in order to turn his land into money. (R. 47.) He borrowed money whenever he was short of funds. (R. 26, 81.) He testified further that he purchased the 102 lots in 1945 and 1946 with the expectation that they would pay off sometime in the future (R. 42); that he acquired each and every lot with the hope of making a profit (R. 82) and, in fact, that he did make a profit on every lot sold (R. 80-81).[8] It is

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[7] None of the property was inherited. (R. 75.)

[8] As this Court observed in *Pool* v. *Commissioner*, *supra*, p. 242, in applying the law of taxation, the courts have drawn a distinction between one who buys property as a long-term investment and the person who buys for speculation in the expectation of a rise in the price and who, as taxpayer testified he did here, buys for resale to any buyer for a profit.

clear that the lots and parcels were acquired by the taxpayer for the purpose of resale at a profit. The lower court's statement on this point is of interest. After hearing the testimony of the taxpayer and weighing it against the whole record the court said (R. 29):

> * * * even as to their intents and purposes at the time of acquisition, the record does not convince us of all that petitioners would have us believe. They would have us believe that many, if not most, of the acquisitions were motivated by altruism and civic and moral responsibilities. The * * * testimony is far from convincing.

Congress, in passing Section 117, intended to afford relief to taxpayers whose property has increased in value over a period of time. However, if the taxpayer engages in an activity or business "* * * separable from his investment, it is not unfair that his gain should be taxed as ordinary income." *Galena Oaks Corp.* v. *Scofield*, 218 F. 2d 217, 220 (C. A. 5th).

Here taxpayer would have the court believe that he was investing his money and that the subsequent sales were in the nature of a liquidation of such investments. Yet, his testimony shows that he was continuously ready to (and did) purchase property if he could obtain a bargain, even borrowing money to do so when necessary, that he maintained a constant inventory of lots and was willing to sell at any time he could make a profit (and, in fact, he did profit from every transaction). These facts, coupled with the following discussion of the lower court's findings

concerning sales, make it clear that here we do not have a gradual and passive liquidation of an investment.

During the seven-year period, 1946-1952, the taxpayer sold 140 lots in 84 separate sales transactions. The gross sales price of the lots sold is not in the record; however, taxpayer's total *net* income from the sale of real estate during these years was $70,348.19, better than an average of $10,000 each year.[9] (R. 24-25.) In the three years under consideration, the taxpayer sold 48 lots or parcels of land in 23 transactions for a gross price of $45,084.32. (R. 23.) His net income from real estate sales for the three years was $27,567.94, or an average of $9,189.31 for each year. [10] (R. 24.) The taxpayer stipulated that the court could consider years other than those in issue in order to obtain a clearer picture of the years in question and in order to make a finding as to whether the taxpayer was, in fact, in the real estate business. (R. 52.) The courts have recognized that, in arriving at an answer to the basic question in cases of this type, it is essential that consideration

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[9] When the net profit for the years 1953-1955 is added, the total *net* income from real estate sales in the ten-year period totals $116,101.99 and the average per year is $11,610.20. (R. 24-25.) On brief (pp. 15, 17) taxpayer speaks of a "dribbling" of sales over the years.

[10] As the lower court points out, the net profit on real estate sales for the three years includes profits from installment payments made on sales consummated in prior years. Likewise, it is probable that the net profit from real estate sales in 1953-1955 of $45,753.80 included some of the sales made in the years 1950-1952. (R. 24-25.)

be given to the overall pattern of taxpayer's business and activity as revealed in the record. *Snell* v. *Commissioner*, 97 F. 2d 891 (C. A. 5th); *King* v. *Commissioner*, *supra*; *Pool* v. *Commissioner*, *supra*; *Saltzman* v. *Commissioner*, *supra*. In the recent case of *Goldberg* v. *Commissioner*, 223 F. 2d 709, the Fifth Circuit said (pp. 712-713):

> Furthermore, if the owner was contemporaneously, or soon before or after, buying and selling other properties on his own account as a dealer, appellate courts have found that this evidence supported factual findings resulting in the denial of capital gain benefits * * *.

See also *Gamble* v. *Commissioner*, *supra*, and *Harriss* v. *Commissioner*, *supra*.

The taxpayer, before, during and after the years in issue, in addition to his purchasing activity, was busy disposing of his property through cash or installment sales. An indication of the extent of his "busyness" is revealed by the fact that he (1) handled the negotiations involved in a large portion of the sales (some prospective buyers were brought to him by brokers who were aware that he had property for sale) (R. 43, 47, 77, 82, 83); (2) conducted all of the legal and paper and other detailed work personally (R. 78-79);[11] (3) handled the originating and collection details of numerous installment sales (R. 23, 43, 78); (4) "borrowed a good deal of money

[11] In spite of taxpayer's statement that he conducted all of the real estate business in his law office, the record shows that he spent considerable time at his home and elsewhere in such activity. (R. 43, 46, 63, 67, 71.)

from banks * * *" to make improvements and to make up mortgages (R. 81); (5) arranged for loans to finance installment purchases which was deducted as a business expense (R. 26, 81; Joint Exs. Nos. 1-A, 2-B, 3-C, 4-D); (6) constructed at least two or three buildings, to make other improvements, and carried on a substantial rental business. (R. 15, 61-62, 73, 83-84). These activities, coupled with the frequency, continuity, and substantiality of purchase and sales transactions, resulting in a substantial and steady income therefrom, and the other facts of record place the taxpayer squarely in the real estate business as well as the practice of law. *Gamble* v. *Commissioner, supra; Murray* v. *Commissioner, supra.*

The taxpayer places reliance upon the fact that he did not engage in an active advertising or promotional campaign in disposing of the lots. Aside from the fact that this is only one of the factors bearing upon the question, and one that has been held not to be controlling by the courts, [12] the taxpayer admits that a seller's market existed. (R. 84.) He stated that the Manhattan Beach area was a growing

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[12] Among the numerous cases in which there was no advertising or similar promotional activity and in which the courts held that the taxpayer was engaged in the business of selling property to customers in the course of this business are: *Gamble* v. *Commissioner, supra; Murray* v. *Commissioner, supra; Saltzman* v. *Commissioner, supra; Lobello* v. *Dunlap, supra; Galena Oaks Corp.* v. *Scofield, supra;* and this Circuit in *Pacific Homes, Inc.* v. *United States* 230 F. 2d 755, and *Rollingwood Corp.* v. *Commissioner, supra.* In *Rollingwood,* speaking of this factor, this Court said (p. 267) "but the number of sales speak for themselves."

community during the years in issue, its population having increased from 5,000 to 35,000 (R. 80-81, 88), and that there was a corresponding growth in the demand for vacant lots (R. 84); that there was a building boom and a great amount of development around the area (R. 80-81, 84-85); that a good many of his friends and others knew that he had lots for sale (R. 85); that frequently brokers and builders called him direct concerning the purchase of lots (R. 76, 77); and that all of these factors combined to create a flood of unsolicited inquiries covering the purchase and sale of property (R. 81). It is submitted that, under these circumstances, the Tax Court was justified fully in finding the lack of advertising to be of little importance—a seller's market making such activity unnecessary. (R. 28.)

Finally, and in completing the picture of taxpayer's activity in the purchase and sale of real property, the Tax Court had before it evidence that taxpayer's income from realty sales far exceeded his fees as an attorney. (R. 24-25, 27-28.) It has been held pertinent to a determination of the present issue for the courts to consider the relation of income from real estate sales to that of the taxpayer's claimed profession. Likewise, this may be done to determine the taxpayer's intention and purpose at the time of sale as well as the results of his action. *Winnick* v. *Commissioner*, 223 F. 2d 266 (C. A. 6th), affirming 21 T. C. 1029; *Mauldin* v. *Commissioner*, 195 F. 2d 714 (C. A. 10th); *Snell* v. *Commissioner*, *supra; Gamble* v. *Commissioner*, *supra; Saltzman* v. *Commissioner*.

In all except two of the years 1946-1955,[13] taxpayer's *net* income from real estate sales exceeded *gross* receipts from his law practice. In nine of these years the net income from realty sales was greatly in excess of the *net* income from his law practice. In 1950, the ratio was about $7 to $1; in 1951, $7.50 to $1; and in 1952, $9 to $1. In total for the three years, net income from law practice was $7,293.59 (gross $20,750.15) compared with net income from real estate sales of $27,567.94 (gross $45,084.32). (R. 24-25.)[14]

As indicated in its opinion (R. 27, 29) the Tax Court took into account the number of purchases and sales, the frequency and continuity of transactions, as well as the other facts of record, and found as an ultimate fact the lots in issue were held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business. We submit that the Tax Court exercised its function with care in considering all of the facts of record and that its findings and decision are supported by the record. It cannot be said from a review of the evidence that the Tax Court's ultimate finding was clearly erroneous.

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[13] Information of law practice fees is not available for 1953, while *gross* law practice fees for 1949 exceeded *net* profit from real estate sales by only $49.47. (R. 24-25.)

[14] In addition, the taxpayer had rental income of $46,629.23 for the ten-year period 1943-1952 and interest income of $5,134.08 for the same period. In total, his net income was as follows for the period 1943-1952 (R. 24-25):

Law Practice	Real Estate Sales, Rent & Interest	Total
$27,908.24	$122,999.82	$150,908.06

CONCLUSION

The decision of the Tax Court is correct and should therefore be affirmed.

Respectfully submitted,

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APPENDIX

Internal Revenue Code of 1939:

SEC. 22. GROSS INCOME.

(a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *

* * * *

(26 U.S.C. 1952 ed., Sec. 22.)

SEC. 117. CAPITAL GAINS AND LOSSES.[15]

(a) *Definitions.*—As used in this chapter—

(1) [as amended by (Sec. 115(b) of the Revenue Act of 1941, c. 412, 55 Stat. 687, and Sec. 151(a) of the Revenue Act of 1942, c. 619, 56 Stat. 798.]) *Capital assets.*—The term "capital assets" means property held by the taxpayer (whether or not connected with his trade or business), but does not include stock in trade of the taxpayer or other property of a kind which would properly be

[15] Section 117(a)(1) was rewritten by Section 210(a) of the Revenue Act of 1950, effective for taxable years beginning after September 23, 1950, but not to an effect material in this case.

included in the inventory of the taxpayer if on hand at the close of the taxable year, or properly held by the taxpayer primarily for sale to customers in the ordinary course of his trade or business, or property, used in the trade or business, of a character which is subject to the allowance for depreciation provided in section 23(1), * * * or real property used in the trade or business of the taxpayer;

* * * *

(26 U.S.C. 1952 ed., Sec. 117.)

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

SEC. 29.22(a)-1. *What Included in Gross Income.*—Gross income includes in general compensation for personal and professional services, business income, profits from sales of and dealings in property, interest, rent, dividends, and gains, profits and income derived from any source whatever, unless exempt from tax by law. (See sections 22(b) and 116.) In general, income is the gain derived from capital, from labor, or from both combined, provided it be understood to include profit gained through a sale or conversion of capital assets. * * *

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SEC. 29.117-1. *Meaning of Terms.*[16]—The term "capital assets" includes all classes of property not specifically excluded by section 117(a)(1).

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[16] Amended by T. D. 5951, 1952-2 Cum. Bull. 81; but not to an effect applicable to this case.

In determining whether property is a "capital asset," the period for which held is immaterial.

The exclusion from the term "capital assets" of property used in the trade or business of a taxpayer of a character which is subject to the allowance for depreciation provided in section 23(1) and of real property used in the trade or business of a taxpayer is limited to such property used by the taxpayer in the trade or business at the time of the sale, exchange, or involuntary conversion. Gains and losses from the sale or exchange of such property are not subject to the percentage provisions of section 117(b) and losses from such transactions are not subject to the limitations on losses provided in section 117(d), except that under section 117(j) the gains and losses from the sale or exchange of such property held for more than six months may be treated as gains and losses from the sale or exchange of capital assets, and may thus be subject to such limitations. See section 29.117-7. Property held for the production of income, but not used in a trade or business of the taxpayer, is not excluded from the term "capital assets" even though depreciation may have been allowed with respect to such property under section 23(1) prior to its amendment by the Revenue Act of 1942. However, gain or loss upon the sale or exchange of land held by a taxpayer primarily for sale to customers in the ordinary course of his business, as in the case of a dealer in real estate, is not subject to the limitations of section 117(b), (c), and (d). The term "ordinary net income" as used in these regulations for the purposes of section 117 means net income ex-

clusive of gains and losses from the sale or exchange of capital assets.

* * * *

SEC. 29.117-7 [as amended by T. D. 5394, 1944 Cum. Bull. 274, 276]. *Gains and Losses from Involuntary conversions and from the Sale or Exchange of Certain Property Used in the Trade or Business.*—Section 117(j) provides that the recognized gains and losses

> (a) from the sale, exchange, or involuntary conversion of property used in the trade or business of the taxpayer at the time of the sale, exchange, or involuntary conversion, held for more than six months, which is
>
> (1) of a character subject to the allowance for depreciation provided in section 23(1), or
>
> (2) real property,
>
> provided that such property is not of a kind which would properly be includible in the inventory of the taxpayer if on hand at the close of the taxable year, or is not held by the taxpayer primarily for sale to customers in the ordinary course of trade or business, and

* * * *

shall be treated as gains and losses from the sale or exchange of capital assets held for more than six months if the aggregate of such gains exceeds the aggregate of such losses. If the aggregate of such gains does not exceed the aggregate of such losses, such gains and losses shall

not be treated as gains and losses from the sale or exchange of capital assets.

* * * *

Sections 39.22(a)-1, 39.117(a)-1 and 39.117(j)-1 of Treasury Regulations 118, promulgated under the Internal Revenue Code of 1939, applicable for the taxable year 1952, are substantially the same as the above-quoted sections of Treasury Regulations 111.

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